UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

WOODMAN'S FOOD MARKET, INC.

and Case 30-CA-78663

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1473

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DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. Woodman's Food Market, the Respondent Company in this case, operates a grocery store and auto center in Appleton, Wisconsin. For at least the last 20 years, the United Food and Commercial Workers Union, Local 1473 has been the exclusive bargaining representative for the employees at the facility. However, on April 10, 2012, shortly after the most recent collective-bargaining agreement expired, the Company withdrew recognition from the Union based on a petition that was circulated by the manager/department head of the auto center (Wydeven).[1]

The sole issue in dispute in this proceeding is whether Wydeven is a supervisor and/or agent of the Company within the meaning of the Act. If he is, as alleged by the General Counsel, the Company concedes that both the circulation of the petition and the withdrawal of recognition were unlawful. See, e.g., *SFO Good-Nite Inn, LLC*, 357 NLRB No. 16 (2011) (employer violates Section 8(a)(1) and (5) of the Act by soliciting employees to sign a decertification petition and by thereafter withdrawing recognition from the union based on the tainted petition).

Following a prehearing conference, the case was tried before me on August 21, 2012, in Neenah, Wisconsin.[2] Thereafter, on September 18, the General Counsel and the Company filed

[1] The Union filed the underlying charge and amended charge on April 12 and July 19, 2012, respectively, and the General Counsel issued the complaint on July 26, 2012.

[2] Wydeven was the sole witness. In the absence of any objection, page 103 of the transcript is corrected as follows: line 24 is correct to read "Cross Examination Resumed"; and line 25 is corrected to read "By Mr. Grubb."

posthearing briefs. Having carefully considered the briefs and the entire record,[3] for the reasons set forth below I find that Wydeven is both a supervisor and an agent of the Company, and that the Company therefore violated Section 8(a)(1) and (5) of the Act as alleged.[4]

FINDINGS OF FACT

As indicated above, the subject facility consists of both a grocery store and an auto center. The auto center is located away from and in front of the store, closer to the street. It includes a gas station, which also sells food and drinks, and a "lube center" with three attached bays where cars drive in to have the oil changed, etc. Approximately six to eight employees work in the auto center, four full time. All are expected to perform both the lube-center and gas-station work. (Tr. 18, 27, 87, 110–112.)

When employees begin working in the auto center, they are given a 44-page document entitled "Lube Station Policies." It contains a detailed description of various lube procedures, including guiding vehicles into the bay, releasing the hood, replacing the oil filter, checking, filling, and changing oil, checking oil plugs and zerks, checking and filling transmission and brake fluids and engine coolant, and changing air filters and wiper blades. (Tr. 107; GC Exh. 21; R. Exh. 19.) However, there is no evidence of any similar policy manual with respect to gas-station procedures.

Wydeven, the current "auto center manager," has worked at the facility for about 10 years, since May 2002. Like the other auto-center employees, he initially started in the grocery store. He later applied for and was transferred to work as a lube technician in the auto center. He performed this job for about 5–6 years, until June 19, 2011, when he was promoted to his current full-time position. (Tr. 16, 39; GC Exh. 20).

There is apparently no formal job description for the "auto center manager" position. However, the job posting, which Wydeven and eight other employees signed to apply for the position in May and June 2011, stated that "responsibilities will include directing the workforce and maintaining customer service" (GC Exh. 2). In addition, Wydeven's change-of-status form stated that he would be "in charge of the auto center" (for which he would receive premium pay and sales points) (GC Exh. 3). And his February 2012 periodic evaluation rated him on such factors as "ability to handle customers/employees," "ability to direct workforce," "ability to control inventory," "buying and/or ordering of product," and "training of backup to cover absence." Frederick, the store manager and his immediate supervisor, also praised him in the evaluation for being "very much a Woodman's backer," for "mak[ing] his people accountable," and for "keep[ing] me informed of what is happening out there." (GC Exh. 11; Tr. 17.)

Various other employment records indicate that the auto center manager is also considered to be a "department head" (GC Exhs. 11, 13, 20). Accordingly, like other department heads (liquor store, meat, produce, dairy, frozen, bakery, and non-foods) and certain specified managers and supervisors, the auto center manager is excluded from the bargaining unit. These

[3] Factual findings are based on the record as a whole, including but not limited to the transcript pages and exhibits specifically cited.

[4] Jurisdiction is undisputed and well established.

exclusions are specifically set forth in an April 2009 letter of understanding between the Company and the Union, which was incorporated into the most-recent, April 2009–March 2012 collective-bargaining agreement. (Jt. Exh. 1, p. 33; Tr. 120–121.)

Aside from Wydeven, there is no one else in the auto center who is "in charge" of the operation. Store Manager Frederick works from an office in the grocery store, does not know how to perform lube work, and visits the auto center only once or twice a week, usually just to report what the gas prices are (Tr. 30–31). Although one of the auto center employees, Keesey, has been appointed the "fill-in supervisor" to cover for Wydeven in his absence (for which he receives a small premium), Keesey remains in the bargaining unit and has been specifically told by Frederick that he is not "second in charge." See the April 2009 letter of understanding discussed above, Jt. Exh. 1, p. 33 (specifically including fill-in supervisors in the unit); and Frederick's December 13, 2011 evaluation of Keesey, GC Exh. 10 (reminding him, among other things, to "[w]ork together as a team. All are equal in the lube station excluding Wydeven who is the lube manager. We do not have a second in charge.").[5]

In practice, Wydeven spends most of his time doing the same work as the lube-center employees: changing oil, handling customers, and working the cash register (Tr. 27). However, he also makes sure the employees follow correct procedures and assists them with questions or problems that arise in doing the work or dealing with a customer. See Wydeven's February 2012 evaluation, GC Exh. 11 (quoted above); the "Lube Station Policies" manual, GC Exh. 21 (instructing employees to "see," "ask," "inform," or "notify" the "lube manager or store manager," "manager," or "supervisor" before doing certain tasks or if they have problems working on any vehicle); and Wydeven's testimony, Tr. 37–38 (the employees come to him with their questions or issues, unless he is not there, in which case they go to Store Manager Frederick). If the question or issue relates to performing the work, he will handle it himself. If it is more complicated, such a customer complaint about the quality of the work that cannot be easily rectified, he will consult Frederick about how the Company wants to handle it. (Tr. 31–34.)

As indicated by his February 2012 evaluation, Wydeven is also responsible for keeping the auto center properly stocked. He usually orders the supplies for the lube center (bulk oil, filters, wipers, plugs, etc.) himself, which he does once every 1–2 weeks. However, Keesey and another employee have also ordered supplies when he is not there. And another employee orders supplies for the gas station. (Tr. 31–32, 84–86, 109.)

Wydeven also completes "performance evaluations" of newly assigned employees near the end of their initial probationary period. (Employees do not receive periodic evaluations after their probationary period. Tr. 65, 67–68.) He assigns the employee a rating (exceeds requirements, meets requirements, needs improvement, or not acceptable) on each of the following "job factors": (1) work quality, (2) job knowledge, (3) work quantity, (4) follows instructions, (5) cooperates with others, (6) dependability, (7) safety, (8) respect for property, (9) courtesy towards customers, (10) appearance, and (11) attendance and punctuality. He also

[5] But see the June 15, 2011 job posting for the fill-in position, which stated that "responsibilities will include directing the workforce and maintaining customer service on days when the manager and 2nd I/C are off" (GC Exh. 4).

completes, in his own handwriting, the designated sections for "comments," "strengths," and "areas for improvement," typically to explain why he assigned either the highest or the lowest rating (e.g. "great customer service," or needs improvement in "problem solving," the "order of doing things in [the] lube center," or "working the gas station"). He does so based on his own observations and judgment, although he also sometimes considers comments from other employees.

After completing the above sections, Wydeven takes the evaluation to Store Manager Frederick. He discusses the evaluation with her and recommends whether the employee should be retained in the auto center or have the probationary period extended. Frederick, who as indicated above spends very little time in the auto center, normally follows his recommendation. However, on one occasion, in November 2011, Frederick declined to do so. Wydeven had reported in his evaluation that the employee was unable to perform certain tasks in the lube center. Nevertheless, he recommended retaining the employee beyond the initial probationary period because of her strong customer service and ability to perform the gas station work, where she spent most of her time. Frederick, however, decided to transfer the employee back to the grocery store because the auto center employees had to be capable of performing both the gas-station and the lube-center work.

Once Frederick has made her decision (by checking a box on the evaluation),[6] Wydeven typically signs the evaluation on the line for "Manager or Supervisor's Signature" and presents the evaluation to the employee (who then signs it as well). However, in one of the six probationary evaluations since June 2011, Frederick signed the evaluation and she and Wydeven jointly presented it to the employee. And in another instance, both Wydeven and Assistant Store Manager Anderson (who, like Frederick, is an admitted supervisor) signed the evaluation, and it is unclear who presented the form to the employee (Wydeven could not recall). (Tr. 43–54, 69–70, 86–87, 91–92, 109, 112; GC Exhs. 5 [both evaluations], 6, 7, 8, 15.)

Wydeven (who as noted above was the sole witness in the proceeding) testified repeatedly that Frederick also talks to other employees about how their coworkers are performing in the auto center before making her decision (Tr. 47, 50, 111). However, I do not credit this uncorroborated testimony, at least not to the extent it suggests that Frederick conducts an independent investigation. First, it is clear from Frederick's February 2012 evaluation of Wydeven and the record as a whole that she relies heavily on him. Second, although Wydeven testified that he had "seen" Frederick "ask people how they are doing when she comes out to talk," he could not recall where she did so ("outside or inside I don't really know") or any particular employees that she had talked to (Tr. 47, 92). Third, as Frederick performs periodic evaluations of both Wydeven and Keesey, his "fill-in supervisor," it is entirely possible that she talked to employees about one or both of them, rather than about other employees. See GC Exhs. 10, 11, and 14.[7] Fourth, the record indicates that the Company has a formal procedure for obtaining input from other employees in writing when it wishes to do so. And the procedure

[6] The three options listed on the form are: "Passing Probation," "Not Passing Probation," or "Extend Probation."

[7] Although Wydeven performed the initial probationary evaluation of Keesey (GC Exh. 6), he testified (Tr. 59) that he had no involvement whatsoever in Keesey's subsequent December 2011 periodic evaluation (GC Exh. 10).

appears to be used relatively infrequently. Indeed, the Company presented only one example where it was used, in August 2010, well before Wydeven became the auto center manager. See the three "Evaluation Work Papers" attached to the probationary evaluation of employee Madison (R. Exh. 2), and Tr. 98–100.[8]

Moreover, Wydeven did not impress me as a credible witness generally. Thus, despite claiming that he did not know what the hearing was about (Tr. 116, 119), he frequently volunteered or modified his testimony to minimize his authority. In addition to his above-cited testimony, see, e.g., Tr. 28–29 (initially testifying that Keesey covers for him when he is not there, but subsequently testifying that he was "unaware" that Keesey is the official "fill-in supervisor"—even though the job was likewise posted in June 2011, Wydeven's evaluation indicates that he trained Keesey to be his backup, and Wydeven completed, signed, and presented a probationary evaluation to Keesey within 30 days after he was appointed to the fill-in position—and that "pretty much anyone" fills in for him in his absence). Further, his testimony at times seemed rehearsed, and he became noticeably nervous when asked about certain subjects, including his discussions with Frederick. Of course, neither necessarily indicates prevarication. However, after carefully considering my initial observations and the entire record, I am convinced that his testimony in this respect (and other respects discussed below) was neither entirely truthful nor entirely true. See generally *300 Exhibit Services & Events, Inc*., 356 NLRB No. 66, slip op. at 1 fn. 2 (2010), and cases cited there (uncontradicted testimony need not be accepted as true if it contains improbabilities or there are other reasonable grounds for believing it is false, including the demeanor of the witness). See also *EEOC v. G-K-G, Inc.*, 39 F.3d 740, 746 (7th Cir. 1994).

In December 2011, Wydeven also completed and signed, on the line for "Management Signature," what appears to be a "verbal" disciplinary warning or admonishment issued to Keesey. The notice, which is entitled "Notice of Failure to Follow Work & Safety Rules," cited Keesey for:

> Failure to follow procedure on oil change. Did not tighten filter causing leaking on vehicle. You must finish the job you are on before moving on to the next one.

The notice additionally cited Keesey for "lack of communication." (GC Exh. 9; Tr. 55–56, 115–116.)

As with the probationary evaluations, Wydeven minimized his involvement with this notice, testifying that Frederick told him to fill it out based on a customer's complaint she had received; that he did not know or recall why he signed the notice; and that Frederick presented the notice to Keesey. In essence, Wydeven testified that he was simply Frederick's scribe. However, it makes little sense that Frederick would have involved Wydeven with the notice if he had no significant role in it. It is also inconsistent with the usual practice. Compare the initial

[8] The "work papers" list five factors (customer service, effort, job performance, cooperation, and appearance). The three employees (Wydeven and two other employees) separately rated Madison on each factor as "poor," "average," or "good." They also then dated and signed the forms on the line for "Supervisor." As discussed infra, Wydeven also signed the final probationary evaluation that was given to Madison the next day.

probationary evaluations, discussed above. Compare also Frederick's subsequent periodic evaluation of Keesey, which she alone completed, signed, and presented to Keesey several days later (GC Exh. 10; Tr. 56–59). (The record also includes another periodic evaluation of Keesey 2 months later, which Wydeven filled out. However, Frederick signed it and the record does not reveal who presented it to Keesey. GC Exh. 14; Tr. 59–61.) And see Frederick's subsequent February 2012 evaluation of Wydeven, discussed above, which praised him for "mak[ing] his people accountable" (GC Exh. 11). Further, as noted above Wydeven was not a credible witness generally, and his testimony in this respect was not corroborated by Frederick or Keesey (neither of whom, as indicated above, were called to testify).

Accordingly, I find that Wydeven likely had a significantly greater role in the notice than he admitted to at the hearing. Specifically, it is likely that, at the very least, Wydeven participated in the investigation of the customer's complaint, reported his findings, conclusions, and recommendations to Frederick, and completed and signed the notice pursuant to his duties and responsibilities as the auto center manager.

Since becoming the auto center manager, Wydeven has also attended a meeting where one of his workers (Gosz) was terminated. Gosz had failed to put any oil in a vehicle, causing the motor to seize up, and also subsequently failed a drug test.[9] Frederick and another grocery supervisor attended the meeting as well.

Again, Wydeven minimized his role in the meeting, testifying that he "asked to attend" because:

> I was really good friends with [Gosz], I actually lived with him for a couple of years, and I felt really bad for him, with the situation. We were really good friends and I didn't want to see him go, so I kind of wanted to be there as support for him.

However, I do not credit this uncorroborated testimony to the extent it suggests that Wydeven attended the Gosz termination meeting solely as a friend. It is inherently unlikely, and I do not believe on this record, that the Company would have permitted Wydeven to attend Gosz' termination meeting absent his role as the auto center manager.[10] Although Wydeven testified that he did not attend a termination meeting for another employee, Wydeven admitted that it occurred shortly after he became manager and he was not familiar with that employee's offense or situation. (Tr. 61–62, 113–114.)

ANALYSIS

As indicated above, the General Counsel contends that Wydeven is a supervisor and/or agent of the Company within the meaning of Section 2(11) and (13) of the Act.

[9] The foregoing is based solely on Wydeven's testimony. There is no documentation in the record about Gosz' termination or the reasons therefor.

[10] Wydeven also testified, when asked by Company counsel whether he had recommended Gosz be terminated, "if it was up to me, he wouldn't have been terminated" (Tr. 88). However, Wydeven never directly answered counsel's question whether he actually made a recommendation to Frederick.

I. *Whether Wydeven is a supervisor*

Under Section 2(11) of the Act,[11] an individual is not considered a supervisor, even if the employer calls him/her one, unless the individual possesses, in the interest of the employer, at least one of the types of authority listed therein. In addition, the exercise of that authority cannot be merely routine or clerical, but must require independent judgment. This means that the authority requires making a judgment, which involves "a degree of discretion that rises above the 'routine or clerical'," and is not "dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective bargaining agreement." *Oakwood Healthcare, Inc*., 348 NLRB 686, 687, 693 (2006). Further, the party asserting supervisory status has the burden of proving that these requirements are met by a preponderance of the evidence. Id. at 687, 694 (citing *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711–712 (2001); and *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003)).

Here, the General Counsel contends that Wydeven possesses two such types of authority: (1) the authority to effectively recommend whether employees will be retained in the auto center following their initial probationary period; and (2) the authority to responsibly direct the auto center employees. The General Counsel also contends that Wydeven's supervisory status is supported by several secondary indicia.

(1) Authority to effectively recommend whether to retain probationary employees

The authority to recommend is considered "effective" under Section 2(11) if the recommendations usually are or would be followed by the deciding official without conducting an independent investigation. See, e.g., *DirectTV*, 357 NLRB No. 149, slip op. at 3 (2011), citing *Children's Farm Home*, 324 NLRB 61 (1997); and *Sheraton Universal Hotel*, 350 NLRB 1114, 1115–1118 (2007). Compare also *Pine Manor Nursing Center*, 270 NLRB 1008 (1984) (charge nurses effectively recommended termination or retention of probationary employees where director of nursing reviewed but did not independently investigate the basis of the recommendation), with *Consolidated Services, Inc*., 321 NLRB 845 (1996) (senior cooks did not effectively recommend promotion of cook-trainees where the facility manager did not follow their recommendations without conducting an independent investigation).

Here, as discussed above, the credible evidence establishes that Frederick follows Wydeven's recommendations whether to retain probationary employees in the auto center based solely on his evaluations and without conducting an independent investigation. Indeed, even in the one instance (out of six) that Frederick disagreed with Wydeven's recommendation, and transferred the employee back to the grocery store, it was based on Wydeven's conclusion that the employee was unable to perform lube work. Accordingly, I find that Wydeven's authority to

[11] See 29 U.S.C. Sec. 152(11) ("The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.")

recommend is "effective." See *Pine Manor*, above. See also *Venture Industries*, 327 NLRB 918, 919–920 (1999) (department and line supervisors effectively recommended selection of applicants where the department managers followed the recommendations 80–90 percent of the time).

As for whether Wydeven's recommendations require "independent judgment," the evidence shows that Wydeven evaluates probationary employees on a number of factors before making his recommendations. As indicated above, some of these factors relate to the actual physical work, much of which (with respect to the lube center) is described in the "Lube Station Policies" manual that is provided to every employee. However, several are more subjective, requiring Wydeven to evaluate such things as "respect for property," "cooperat[ion] with others," and "courtesy towards customers."[12] Further, Wydeven testified that, except for ordering supplies, he has never been given any specific instructions on how to perform his duties as auto center manager, and that he completes the probationary evaluations using his own "judgment," based on his and others' observations of the employee, without discussing them with anyone beforehand (Tr. 26, 31–32, 80–84).

I find that the foregoing evidence is sufficient to meet the General Counsel's burden under *Oakwood*, above. In arguing to the contrary, the Company cites two previous probationary evaluations that Wydeven signed in August and November 2010, well before he became auto center manager. See R. Exh. 1 (Beyer evaluation), and R. Exh. 2 (the Madison evaluation previously discussed above). The Company argues that these two evaluations show that "it is the clerical practice of the Employer to have unit employees partially fill out and sign [probationary evaluations] and it has been so practiced since well before Mr. Wydeven took on his current responsibilities" (Br. 13).

However, there are several problems with this argument. First, Wydeven testified that he was unsure whether he did the ratings on the Madison evaluation. Moreover, he acknowledged that someone else handwrote the comments on both evaluations. (The handwriting is obviously different that the handwriting on the evaluations he has completed since June 2011.) With respect to the November 2010 Beyer evaluation, Wydeven testified that he "probably" asked "one of the girls" in the gas station to write the comments for him because he was "embarrassed" by his "very sloppy" handwriting at the time. However, he was never asked who specifically wrote the comments on the Madison evaluation. (Tr. 101–102.)

Second, even assuming Wydeven did fill out both evaluations (or had someone else fill them out for him at his direction), two evaluations are hardly sufficient to establish a "practice," clerical or otherwise.[13] On the contrary, the fact that the Company, which has been in business

[12] While the manual addresses this last factor, it simply urges employees to be "courteous, professional, and friendly with the customer," and to "greet them when they exit the vehicle and ask if they have any questions." (GC Exh. 21, pp. 7, 43). It does not otherwise state what kinds of conduct are or are not considered by the Company to be "courteous," "professional," and "friendly."

[13] To conclude that the 2010 evaluations show a "clerical" practice of using unit employees to evaluate each other requires an assumption that Wydeven was not a statutory supervisor in 2010. However, while Wydeven had not yet been designated the "auto center manager" in 2010, as

for many years, proffered only two evaluations, both signed around the same time period in 2010 by the same individual, suggests that the two evaluations are an aberration rather than the norm.

Third, it is unclear whether the circumstances in 2010 were the same or similar to those in 2011–2012. Indeed, it is not even clear whether there was an active, full-time auto center manager at the time Wydeven signed the 2010 evaluations. Although the previously described letter of understanding indicates that another individual, Cortazzo, was the manager in April 2009, and Wydeven testified that he replaced Cortazzo (Tr. 19), Cortazzo's name does not appear anywhere on the two evaluations. In fact, the Madison evaluation indicates that an entirely different individual, Champeau, presented the evaluation. (Wydeven testified that he presented the Beyer evaluation.) And, despite Cortazzo's previous service as the auto center manager in 2009, he was one of several employees who applied to be the "fill-in supervisor" on June 16, 2011 (GC Exh. 4), before Wydeven was formally appointed the new manager effective June 19, 2011.

The Company never presented any evidence to explain the foregoing circumstances.[14] Wydeven himself testified (Tr. 100) that he did not know why he signed the 2010 Madison evaluation (he was never asked why he signed the 2010 Beyer evaluation), and Champeau's position or title was never identified. Further, the Company never called Frederick to testify, even though she was present throughout the hearing. (Frederick was the Company's designated representative and was therefore exempt from the sequestration order.) Although the General Counsel has the burden of proof, the Company introduced the 2010 evaluations, which came from its own personnel records.[15] Thus, the Company bears the burden of persuading that the evidence is relevant, material, and significant, i.e., that the two previous 2010 evaluations signed by Wydeven support an inference that the 2011–2012 evaluations and other evidence presented by the General Counsel in support of Wydeven's supervisory status during the relevant period are insufficient to carry the burden of proof.[16] The Company has failed to do so. As presented, the two evaluations are little more than a historical curiosity.[17]

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indicated above supervisory status under 2(11) is not determined by job title. See also *Jochims v. NLRB*, 480 F.3d 1161, 1168, 1173 (D.C. Cir. 2007).

[14] The Company's posthearing brief states (without citing any record evidence) that Cortazzo "was demoted by the Employer into a non-supervisory position" (Br. 2, fn. 3). However, the Company does not reveal when this occurred (and, again, there is no record evidence when it occurred). The Company also submitted into evidence a form that employee Madison signed in July 2010 acknowledging receipt of the company lube center policy manual, which Wydeven cosigned on the line for "Training Supervisor" (R. Exh. 19; Tr. 108). However, the Company never offered any evidence to explain this either.

[15] The 2010 evaluations had not previously been disclosed to the General Counsel. There is no pretrial discovery in Board proceedings and the General Counsel's hearing subpoena only required the Company to produce personnel records since January 2011, 6 months before Wydeven became the auto center manager (Tr. 120).

[16] This is not a situation, such as in *Dean & Deluca,* supra, where there are critical gaps in the General Counsel's evidence with respect to the subject 2(11) indicia during the relevant period.

[17] As indicated by the General Counsel, the Company's failure to call Frederick—who as store manager would likely be disposed to testify in the Company's favor (and thus was not "equally available" as a General Counsel or Union witness)—actually supports the opposite

(2) Authority to responsibly direct the auto center employees

In order to establish that an individual possesses the authority to responsibly direct employees, it must be shown that the individual has the authority to "direct" employees in the interest of the employer; that the direction is "responsible"; and that it requires "independent judgment." *Oakwood,* 348 NLRB at 687. See also the Board's companion decisions in *Golden Crest Healthcare*, 348 NLRB 727, 730 (2006); and *Croft Metals, Inc*., 348 NLRB 717 (2006).

Here, there is little doubt that Wydeven has the authority to "direct" employees. As discussed above, the employees are required by the lube center policy manual to contact Wydeven or Frederick before doing certain tasks or if they have problems working on any vehicle. Further, Wydeven testified that the employees do, in fact, come to him with their questions or issues when he is there, and that Frederick does not even know how to perform the lube work. Moreover, Wydeven's February 2012 evaluation specifically rated his ability to handle employees and direct the workforce and praised him for "mak[ing] his people accountable." Considered together, these facts are sufficient to establish the authority to direct. Cf. *Golden Crest*, above.

A preponderance of the record evidence also indicates that Wydeven's authority to direct employees is "responsible" direction. Direction is "responsible" if the individual directing the task is accountable for its performance. This means that the directing individual has the authority to take action, if necessary, to ensure that the task is performed correctly by the employee, and that there is a real prospect of material consequences to the directing individual's terms and conditions of employment, either positive (e.g., a merit increase or bonus) or negative (e.g. a demotion or termination), if the task is or is not performed correctly by the employee. *Golden Crest*, 348 NLRB at 731 and fn. 13.[18]

Here, as found above, Wydeven had a significant role in the disciplinary warning that was issued to Keesey in December 2011 for failing to follow lube procedures and poor

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inference, i.e. an inference that her testimony on this and other factual issues within her knowledge would not have supported the Company's position. See, e.g., *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. mem. 861 F.2d 720 (6th Cir. 1988). See also *Chicago College of Osteopathic Medicine v. George A. Fuller Co*., 719 F.2d 1335, 1353 (7th Cir. 1983). But see *Advocate South Suburban Hospital v. NLRB*, 468 F.3d 1038, 1049 (7th Cir. 2006) (General Counsel's failure to call a union organizer to corroborate an employee's testimony did not warrant an adverse inference, as the respondent employer itself could have subpoenaed the union organizer to testify and the General Counsel did not have a strong incentive to present the testimony, as it would have been "essentially cumulative and of little value"). However, I need not rely on such an adverse inference, as I would reach the same conclusions without it.

[18] Although *Oakwood* states that there must be a prospect of adverse consequences for failing, the Board's companion decision in *Golden Crest* makes clear that a prospect of positive consequences for succeeding is also sufficient to establish accountability. See also *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. at 3 fn. 12 (2012). Indeed, this seems self evident; if there is a prospect of a merit increase or bonus for succeeding, it follows that there is a prospect of a merit increase or bonus being denied for failing.

communication. Further, approximately 2 months later, in February 2012, Frederick specifically evaluated Wydeven's ability to handle employees and direct the workforce (he was rated "meets requirements" on both these and all other factors) and praised him for "mak[ing] his people accountable."[19] And approximately 7 weeks thereafter, effective April 8, 2012, the Company awarded Wydeven his first and only base-rate pay raise since he became the auto center manager in June 2011 (GC Exh. 20, p. 2).[20] While there is no record evidence that the Company awarded Wydeven the raise solely because of his performance in directing employees and holding them accountable, such evidence is not required to establish that his performance on that factor may have an affect on his terms and conditions of employment. Ibid.

Finally, a preponderance of the evidence likewise indicates that Wydeven's direction of employees requires "independent judgment." As discussed above, although the lube center policy manual provides a detailed description of the various services and procedures performed in the lube center, it repeatedly instructs employees to contact their manager or supervisor before doing certain tasks or if they have questions or problems. Further, there is no policy manual whatsoever for the gas station. Thus, while many of the tasks in the auto center may be repetitive and "dictated or controlled by detailed instructions" (*Oakwood*, above), many are not. Moreover, as discussed above, except for ordering supplies in the lube center, Wydeven has never been given any specific instructions on how to perform his duties as auto center manager. Thus, like his probationary evaluations and recommendations, it is clear that his direction of employees involves discretion that is beyond "routine or clerical."

Secondary indicia of supervisory status

As indicated by the General Counsel, the conclusion that Wydeven is a 2(11) supervisor based on the foregoing factors (either of which alone is sufficient to establish such status) is fully consistent with how he has been treated and held out by the Company. As discussed above, the

[19] As reflected by the Board's own definition of "accountable," this language indicates that Wydeven possesses the authority to take corrective action (and has actually exercised that authority). It also indicates that Wydeven's corrective action had "some force behind it or place[d] 'some small burden on the employee'" (*Rochelle Waste Disposal, LLC v. NLRB*, 673 F.3d 587, 595 (7th Cir. 2012), quoting *Loparex LLC v. NLRB*, 591 F.3d 540, 551 (7th Cir. 2009)). Although no specific examples are discussed, the evaluation was completed by Frederick, an admitted supervisor of the Company, the party currently opposing Wydeven's supervisory status, before the facts relevant to the instant litigation occurred, when there was no apparent reason for concern about his status. The evaluation is therefore more reliable evidence of Wydeven's authority than post-hoc conclusory testimony offered by the party alleging supervisory status. Cf. *G4S Regulated Security Solutions*, 358 NLRB No. 160 (2012) ("rote and conclusory testimony" of respondent's project manager in response to leading questions by counsel was insufficient to satisfy respondent's burden of establishing supervisory status).

[20] Although there is no direct evidence that the pay raise was based on the evaluation, the satisfactory ratings and positive comments in the evaluation, coupled with the timing of the pay raise (10 months after starting and just 7 weeks after the evaluation) and the absence of any prior or subsequent raises, is sufficient circumstantial record evidence (which the Company never rebutted) to satisfy the General Counsel's burden of proof that there is a prospect of positive or negative consequences as a result of the evaluation.

Company describes Wydeven as a "manager" and "department head" and he is excluded from the bargaining unit by agreement along with other managers and department heads (including Assistant Store Manager Anderson, an admitted statutory supervisor). Further, Store Manager Frederick specifically advised unit employee Keesey in December 2011 that he and the other auto center employees are not "equal" to Wydeven and that there is no "second in charge" in the auto center. In addition, Wydeven has signed and presented probationary evaluations to employees, also signed a disciplinary warning to an employee, and attended the termination meeting for another employee. Cf. *Sheraton Universal Hotel*, 350 NLRB at 1118 (listing several similar "secondary indicia" as corroborating evidence of 2(11) supervisory status). See also *E & L Transport Co. v. NLRB*, 85 F.2d 1258, 1270 (7th Cir. 1996) ("Although not determinative on their own, where one of the enumerated indicia in Sec. 2(11) is present, secondary indicia support a finding of statutory supervisor").

Accordingly, for all the foregoing reasons, I find that Wydeven is a supervisor within the meaning of Section 2(11), and that the Company therefore violated the Act as alleged.

II. *Whether Wydeven is an agent*

As indicated above, the General Counsel additionally or alternatively contends that Wydeven is an agent of the Company under Section 2(13) of the Act.[21] Although there is no evidence that he was specifically directed or authorized by the Company to circulate the antiunion petition, the General Counsel asserts that Wydeven was acting as an agent of the Company under the doctrine of apparent authority.

As stated in *Hausner Hard-Chrome of Kentucky*, 326 NLRB 426, 428 (1998):

> "Apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal had authorized the alleged agent to perform the acts in question." *Southern Bag Corp.*, 315 NLRB 725 (1994), and cases there cited. See also *Alliance Rubber Co.*, 286 NLRB 645, 646 (1987). The test is whether, under all the circumstances, employees "would reasonably believe that the employee in question [the alleged agent] was reflecting company policy and speaking and acting for management." *Waterbed World*, 286 NLRB 425, 426-427 (1987). Under Board precedent, an employer may have an employee's statements attributed to it if the employee is "held out as a conduit for transmitting information [from management] to other employees." *Debber Electric*, 313 NLRB 1094, 1095 fn. 6 (1994).

As with supervisory status, the burden is on the party asserting the agency relationship with respect to specific conduct to prove it. *Pan-Oston Co*., 336 NLRB 305 (2001).

[21] See 29 U.S.C. Sec. 152(13) ("In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.")

Here, as discussed above, the Company holds out Wydeven as a member of management and utilizes him as a "conduit" for transmitting information to employees about whether they will be retained following their probationary period. Moreover, as Wydeven is excluded from the bargaining unit along with other managers and department heads, it cannot be concluded that the unit employees would likely view his antiunion actions as taken in furtherance of his own or their interests, rather than the Company's interests. Cf. *Comau, Inc*., 358 NLRB No. 73 (2012) (reaching the opposite conclusion where the individuals who circulated the disaffection petition were included in the unit and had previously served as union officials). Although there is no record evidence that Wydeven's statements or actions were consistent with the Company's statements or actions, this is not dispositive. *Pan-Oston*, 336 NLRB at 306.

Accordingly, I find that the General Counsel has adequately established that Wydeven was an agent of the Company when he circulated the petition, and that the Company therefore violated the Act on this basis as well.

CONCLUSIONS OF LAW

1. By soliciting employees, through its supervisor and agent Wydeven, to withdraw their support for the Union in March and April 2012, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By withdrawing recognition from the Union on April 10, 2012, and thereafter refusing to bargain with the Union as the exclusive collective-bargaining representative of the unit employees, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

To remedy the foregoing violations, the complaint requests that the Company be ordered to recognize and, on request, bargain with the Union over the unit employees' terms and conditions of employment; to promptly notify the Union of any changes in the unit employees' terms and conditions of employment that have been implemented since April 10, 2012; to rescind, at the Union's request, such changes; and to make the unit employees whole for any loss of earnings or benefits suffered as a result of the changes, with interest compounded daily. In addition, the complaint requests that the Company be ordered to read the remedial notice to employees during working time. The Company has not contested the appropriateness of any of these requested remedies and they are supported by Board precedent. See *Specialty Hospital of Washington-Hadley, LLC*, 357 NLRB No. 77 (2011); and *Vincent/Metro Trucking, LLC*, 355 NLRB 289 (2010). The remedies are therefore granted.[22]

[22] One of the two management officials who notified the employees on April 12, 2012 that the Company had withdrawn recognition from the Union based on the petition will be ordered to read the remedial notice to the employees. See Jt. Exh. 3 (also notifying employees that the Company would be granting them a wage increase that it had previously proposed during contract negotiations with the Union).

The complaint also requests that the Company be ordered to reimburse employees for any excess Federal and State income taxes they may owe from receiving lump-sum backpay, and to submit appropriate documentation to the Social Security Administration so that their backpay will be allocated to the proper periods. However, the appropriateness of such remedies is currently being considered by the Board. See *Latino Express*, 358 NLRB No. 94 (2012). These additional remedies are therefore denied.

Accordingly, based on the foregoing findings of fact and conclusions of law and the entire record, I issue the following recommended[23]

ORDER

The Respondent Company, Woodman's Food Market, Inc., Appleton, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with United Food and Commercial Workers Union, Local 1473 as the exclusive collective-bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive representative of the unit employees concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Promptly notify the Union, in writing, of any changes in the unit employees' terms or conditions of employment that have been implemented since April 10, 2012.

(c) On request by the Union, rescind any changes in the unit employees' terms or conditions of employment since April 10, 2012.

(d) Make the unit employees whole for any loss of earnings or benefits suffered as a result of any changes in their terms or conditions of employment since April 10, 2012, with interest compounded daily.

[23] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at its Appleton, Wisconsin facility, copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 10, 2012.

(f) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by Vice President Clint Woodman or Vice President John Adams, or, at the Respondent's option, by a Board agent in the presence of either or both of the foregoing company officials, with translation available for any non-English speaking employees.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., October 5, 2012

_____

Jeffrey D. Wedekind
Administrative Law Judge

[24] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain in good faith with United Food and Commercial Workers Union, Local 1473 as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union and put in writing and sign any agreement reached on terms and conditions of employment for the employees in the bargaining unit.

WE WILL promptly notify the Union, in writing, of any changes in the unit employees' terms or conditions of employment that we have been implemented since April 10, 2012.

WE WILL, on request by the Union, rescind any changes in the unit employees' terms or conditions of employment since April 10, 2012.

WE WILL make the unit employees whole for any loss of earnings or benefits suffered as a result of any changes in their terms or conditions of employment since April 10, 2012, with interest compounded daily.

WOODMAN'S FOOD MARKET, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

310 West Wisconsin Avenue, Suite 700, Milwaukee, WI 53203-2211
(414) 297-3861, Hours: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (414) 297-2862.